

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANTHONY FRANCO,

Plaintiff,

ORDER
08 CV 2638 (ENV) (LB)

-against-

HMS HOST CORPORATION,

Defendant.

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BLOOM, United States Magistrate Judge:

Defendant moves for sanctions in the amount of \$4,158.63 against plaintiff for his failure to appear at his deposition on May 19, 2009. See docket entry 22. Plaintiff's counsel opposes defendant's motion stating that plaintiff left a message that "he was calling" on the morning of the deposition, but was unable to reach counsel. See docket entry 23. Plaintiff's counsel argues that plaintiff's behavior does not rise to the level of "wilfulness" or "bad faith" and that if the Court imposes sanctions, it should reduce the amount sought in light of "plaintiff's monetary resources." Id. Defendant's reply points out that plaintiff's counsel has failed to reschedule plaintiff's deposition as directed by my June 3 Order. See docket entry 24. Defendant therefore has noticed plaintiff's rescheduled deposition on June 29, 2009 at 11:30 a.m. Id.

The Court finds no basis to excuse plaintiff's failure to appear for his May 19, 2009 deposition. Therefore, defendant's motion for sanctions is granted. However, in light of this being plaintiff's first failure to appear, the Court will not impose the full amount requested. The Court hereby orders plaintiff Anthony Franco to pay \$2,000. as a sanction to defendant for his failure to appear at his deposition. Anthony Franco shall pay this sanction by bank check, certified check or money order to defendant's attorney by July 30, 2009.

Moreover, the Court hereby orders plaintiff to timely appear for his rescheduled deposition on **June 29, 2009 at 11:30 a.m.** at the location stated in defendant's notice. This is a Court Order and plaintiff must comply. The Court warns plaintiff that if he fails to timely appear for his deposition, I will recommend that his case should be dismissed. See Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298 (2d Cir.2009) (per curiam) (dismissing *pro se* plaintiff's case where plaintiff repeatedly failed to comply with the Court's orders); Valentine v. Museum of Modern Art, 29 F.3d 47, 49 (2d Cir. 1994) (The sanction of dismissal may be imposed so long as warning has been given that noncompliance can result in dismissal); Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759 (2d Cir. 1990) (affirming dismissal of action, pursuant to Fed. R. Civ. P. 37, for plaintiff's refusal to appear at her deposition).

SO ORDERED.

LOIS BLOOM
United States Magistrate Judge

Dated: June 15, 2009
Brooklyn, New York